

# Joint Retainers in Immigration Law Can Pose Complex Ethical Issues

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This article will focus on lawyers' ethical responsibilities when dealing with joint retainers. The Law Society of Ontario's *Rules of Professional Conduct* ("the Rules") and case law refer to these types of retainers, and other Canadian and U.S. jurisdictions also have rules addressing these situations.

Joint retainers are common in many areas of practice, and they are especially important for immigration lawyers, as situations may arise where multiple parties may be involved in an application. As an example, in spousal sponsorships, both spouses participate in the application, one as the sponsor and the other as the applicant. However, if the relationship breaks down, this may create a potential conflict of interest for the lawyer who may receive contradictory instructions from the spouses, one wishing to continue the application and the other one trying to withdraw.

The Supreme Court of Canada (SCC) in *Strother*<sup>1</sup> defined the "bright line rule" in their majority ruling, stating that "a lawyer may not concurrently represent one client whose interests are directly adverse to the immediate interests of another current client...unless both clients consent after receiving full disclosure (and preferably independent legal advice) and the lawyer believes that he or she is able to represent each client without adversely affecting the other."<sup>2</sup>

The SCC clarified the bright line rule in *McKercher*<sup>3</sup> and included third-parties as parties to consider when dealing with a potential conflict of interests. Specifically, the majority held that "...when the bright line rule is inapplicable, the question becomes whether the concurrent representation of clients creates a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."<sup>4</sup>

In its judgment, the SCC discussed the duty to avoid conflicting interests, the duty of commitment to a client's cause, and the duty of candor as related duties that a lawyer must consider when representing multiple parties.

Several issues arise from the breakdown of a relationship between the parties that may implicate the Rules. First, the lawyer must always confirm who their client is from the outset. In the case of a spousal sponsorship, it is most likely that the Canadian-resident spouse would be the sponsor, and therefore the client. However, the foreign spouse is still a party with direct interest in the outcome, even if the Canadian-resident spouse is the only one who signed the retainer agreement and pays the legal fees. A relationship breakdown may cause prejudice to the foreign spouse. This possibility is something that is best addressed at the initial consultation and confirmed in writing so both lawyers and clients are aware of the implications that a potential conflict would have on the matter.

This issue was addressed in *Reith*,<sup>5</sup> where a lawyer failed to discuss the intricacies of a joint retainer with his clients while acting for both parties in a transfer of shares and what would happen if a conflict of interest arose between the parties during the joint retainer. While he was working on the matter, the lawyer became unclear about who his client was. He did not share details of transactions between all the parties, thereby contravening the *Code of Professional Conduct for British Columbia* (the "BC Code").<sup>6</sup> His failure to disclose relevant information to the clients was one of the factors that led the tribunal to find that the lawyer was guilty of professional misconduct. The tribunal fined the lawyer to satisfy its obligation to protect the public interest in the administration of justice.<sup>7</sup>

In *Golden*,<sup>8</sup> a lawyer found himself in a conflict-of-interest situation while representing a husband and wife.

<sup>1</sup> *Strother v. 3464920 Canada Inc.*, 2007 SCC 24.

<sup>2</sup> *Ibid* at para 29.

<sup>3</sup> *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39.

<sup>4</sup> *Ibid* at para 8.

<sup>5</sup> *Law Society of British Columbia v Reith*, [2016] LSDD No 134.

<sup>6</sup> Rule 3.4-5: Before a lawyer is retained by more than one client in a matter or transaction, the lawyer must advise each of the clients

that:(a) the lawyer has been asked to act for both or all of them; (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

<sup>7</sup> *Supra* at para 18.

<sup>8</sup> *Law Society of British Columbia v Golden*, [2019] LSDD No 85.

The lawyer represented the wife in a sale of property while also representing the husband in securing a promissory note from the wife with respect to the same property.<sup>9</sup> In that case, the lawyer did not advise the wife to seek independent legal advice. The lawyer was ordered to pay a hefty fine of \$20,000 after the finding of misconduct.

Another common situation involving multiple parties may occur when an employer seeks to bring a foreign employee to Canada and retains a lawyer to pursue a work permit application. Some employees may be inadmissible to Canada by reason of criminality, even for misdemeanors or old convictions. Occasionally, employees may disclose to the lawyer that they intend to leave the job without the employer's knowledge, and therefore their interests are not aligned. In such cases, the question will arise as to who the client is. If the employee is inadmissible to Canada and has not disclosed his convictions to the employer, this should cause alarm in the lawyer, as the potential for rejection of the work permit is very high. The lawyer has a fiduciary duty to the client and the obligation to inform him of potential problems. On the other hand, disclosing that information without the employee's consent may expose the lawyer to liability or to professional sanctions. It may also constitute a violation of privacy in many jurisdictions.

A lawyer representing an employer on a work permit application should consider the possibility that the employee may have a different agenda. In *Boraks*<sup>10</sup> the lawyer followed an employer's direction to extend a work permit for a foreign worker for a short period of time. However, unbeknownst to the lawyer, the employee wanted a much longer extension. While the employer

was trying to solve a short-term worker shortage, the employee wanted to stay in Canada long-term and apply for permanent residence.<sup>11</sup> The lawyer was unclear about who his client was, and argued that he had no relationship with the employee as there was no retainer.<sup>12</sup> However, the Law Society of Ontario tribunal hearing the case held that despite a lack of retainer, the lawyer still had a duty of care to the employee as an interested party.<sup>13</sup>

Lawyers may also learn information from an interested party that they are requested not to disclose to the retaining client. The ABA Model Rules 1.6(a)<sup>14</sup> and 1.4(b)<sup>15</sup> prescribe how lawyers should view their duty of loyalty to their clients. Following those guidelines, the lawyer is obligated to disclose all potential problems so clients can make an informed decision in their matter. It is best practice to always discuss these potential concerns at the outset of joint retainers or when working with multiple parties. This can be done at the initial consultation and should be followed by a written confirmation.

In Canada, the *Personal Information and Protection and Electronic Documents Act* (PIPEDA) specifically protects individuals' privacy. There is an obligation to protect the client's privacy. Where an organization collects information, such information must only be disclosed with consent.<sup>16</sup> Lawyers must be mindful of their obligation to keep their clients' information private and to only disclose it with their consent.

In Ontario, the Rules deal with the duties to avoid conflicts of interest,<sup>17</sup> commitment to a client's cause,<sup>18</sup> and candor.<sup>19</sup> The Rules are meant to protect clients who rely on lawyers to represent them. No information shared by one party shall be hidden from the other.<sup>20</sup> A

example, when an organization wants to use information for a purpose not previously identified).

<sup>17</sup> Rule 3.4-2 A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

<sup>18</sup> Rule 3.4-1 Commentary [2] In addition to the duty of representation arising from a retainer, the law imposes other duties on the lawyer, particularly the duty of loyalty. The duty of confidentiality, the duty of candor and the duty of commitment to the client's cause are aspects of the duty of loyalty. This rule protects all of these duties from impairment by a conflicting duty or interest.

<sup>19</sup> Rule 3.2-2 When advising clients, a lawyer shall be honest and candid.

<sup>20</sup> Rule 3.4-5 (b) Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that...(b) no information received in connection with the matter from

<sup>9</sup> *Ibid* at para 2(b).

<sup>10</sup> *Law Society of Ontario v Boraks*, 2021 LSDD No 56.

<sup>11</sup> *Ibid* at para 25.

<sup>12</sup> *Ibid* at para 22.

<sup>13</sup> *Ibid* at para 24.

<sup>14</sup> Rule 1.6(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

<sup>15</sup> Rule 1.4(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

<sup>16</sup> PIPEDA Schedule 1 s. 4.3.1 Consent is required for the collection of personal information and the subsequent use or disclosure of this information. Typically, an organization will seek consent for the use or disclosure of the information at the time of collection. In certain circumstances, consent with respect to use or disclosure may be sought after the information has been collected but before use (for

difficulty arises when there may only be one client, while the other party is an interested party. The Rules address this by stating that a lawyer shall not act or continue to act where there is a conflict of interest.<sup>21</sup> In the commentary to this Rule, it is noted that lawyers have a duty to other persons.<sup>22</sup>

The reputation of the administration of justice is another facet of professional responsibility that lawyers must consider. The Rules state that a lawyer must encourage public respect for the administration of justice.<sup>23</sup> This cannot occur where there is a lack of transparency regarding who the represented parties are.

Joint retainers may be used in many areas of law and they are common in immigration practice involving spousal and work permit applications. Where a conflict arises between parties, a lawyer must always balance the duty to the client with the overall obligation not to harm third parties. Lawyers must follow the codes of conduct or model rules in their jurisdiction as they navigate this difficult situation. The best practices are due diligence at the outset and written retainers that fully disclose potential conflicts and how to deal with them.

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one client can be treated as confidential so far as any of the others are concerned.

<sup>21</sup> Rule 3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

<sup>22</sup> Rule 3.4-1 Commentary [1] As defined in rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a

former client, or a third person. Rule 3.4-1 protects the duties owed by lawyers to their clients and the lawyer-client relationship from impairment as a result of a conflicting duty or interest. A client's interests may be seriously prejudiced unless the lawyer's judgement and freedom of action on the client's behalf are as free as possible from conflicts of interest.

<sup>23</sup> Rule 5.6-1A lawyer shall encourage public respect for and try to improve the administration of justice.